UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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WELLS FARGO BANK, N.A., as Trustee for the registered holders of J.P. Morgan Chase Commercial Mortgage Corp., Commercial Mortgage Pass-Through Certificates, Series 2002-CIBC4, acting by and through its Special Servicer, LNR Partners, LLC,

Plaintiff,

-against-

JPMORGAN CHASE BANK, N.A.,

Defendant.

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OPINION

12 Civ. 6168 (MGC)

APPEARANCES:

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Cedarbaum, J.

In this diversity suit, Wells Fargo Bank, N.A., as trustee for the registered holders of J.P. Morgan Chase Commercial Mortgage Pass-Through Certificates, Series 2002-CIBC4, acting by and through its special servicer LNR Partners, LLC, sues JPMorgan Chase Bank, N.A. Wells Fargo alleges a breach of contract related to representations and warranties made by JPMorgan in a mortgage loan purchase agreement. JPMorgan moves to dismiss the complaint as time barred. For the reasons that follow, the motion to dismiss is granted.

FACTS

The complaint alleges the following facts. Since 1979, Highland Mall Limited Partnership leased a parcel of land in Austin, Texas for the purpose of operating a shopping mall. The property covered by this "Ground Lease" included only a portion of the Highland Mall. Crucially, it excluded the mall's three "anchor stores" -- the prominent retailers expected to draw customers to the mall for the benefit of the smaller shops.

On June 28, 2001, as part of a refinancing, JPMorgan originated and extended a $71 million commercial loan to the Partnership. The loan was secured in part by the Partnership's interest in the Ground Lease through a leasehold deed of trust and security agreement. Concurrent with the refinancing, the Ground Lease was amended to add Section 5.06(a), which Wells

Fargo calls the "First Class Mall Restriction." Compl. at 2. This provision required the Partnership "to operate the Leased Property at all times in accordance with prevailing standards for 'first class regional shopping malls located in the United States of America.'"

Wholly separate from the First Class Mall Restriction was a second agreement governing the mall's anchor stores. That operating agreement required retail use of the anchor stores through August of 2001 but thereafter imposed no restrictions on the properties' use. It also provided for a parking area for the Highland Mall extending through 2068 if the anchor stores remained operational, and through 2021 otherwise.

In February of 2002 JPMorgan generated for the Partnership's loan an underwriting summary that "emphasized" the mall's anchor stores and "acknowledged" that the anchor stores provided support for other tenants. The underwriting summary mentioned neither 1) that the First Class Mall Restriction in the Ground Lease was not tied to the retail operating covenant governing the anchor stores, nor 2) that the anchor stores' retail covenants were set to expire during the term of the commercial loan.

On April 29, 2002, JPMorgan sold its interest in the loan as part of a mortgage loan purchase agreement (the "MLPA") to JPMorgan Chase Commercial Mortgage Securities Corp. ("JPMCC").

JPMCC, in turn, deposited the commercial loan into the JPMCC Commercial Pass-Through Series 2002-CIBC4 Trust (the "Trust"), and, in relevant part, assigned its rights under the MLPA to plaintiff Wells Fargo.

Beginning in 2006, their operating agreement having expired, the three anchor stores shut down and were taken over by a nonretail tenant. Faced with the closure of the anchor stores and the resulting loss of customer traffic, the inline mall tenants began closing their own stores.

In June of 2009, the Partnership's loan was transferred to special servicing due to imminent default. In July of 2009, the Partnership's lessor gave notice of defaults under the Ground Lease, including the Partnership's failure to operate the property as a "first-class regional shopping mall" as required by Section 5.06(a) of the Ground Lease. A second notice followed in August of 2009, informing the Partnership that the Ground Lease would be terminated. In September of 2009, the Partnership defaulted on the commercial loan.

On December 23, 2010, Wells Fargo demanded that JPMorgan repurchase the loan because JPMorgan's "representations and warranties regarding the Ground Lease and its origination practices were untrue." Compl. at 10. The MLPA provided that such demand was "the sole remedy available to the Purchaser" in the event of breach. Compl. ex. 2. JPMorgan denied that it had

breached any representation and warranty and refused to repurchase the commercial loan. On August 7, 2012, the Trust sold its interest in the Ground Lease at a loss of roughly $73 million. Wells Fargo then brought this lawsuit, alleging that JPMorgan breached its contract by making false representations and warranties in the MLPA and by failing to repurchase the loan. JPMorgan now moves to dismiss the action as time barred.

DISCUSSION

New York enforces a six-year statute of limitations for breach-of-contract claims. N.Y. C.P.L.R. § 213(2). "[I]t is well settled that the statute of limitation for breach of contract begins to run from the day the contract was breached, not from the day the breach was discovered, or should have been discovered." ABB Indus. Sys., Inc. v. Prime Tech., Inc., 120 F.3d 351, 360 (2d Cir. 1997). This is true even when the alleged injury occurs after the breach itself. Ely-Cruikshank Co. v. Bank of Montreal, 81 N.Y.2d 399, 402 (1993); see also T & N PLC v. Fred S. James & Co. of New York, 29 F.3d 57, 60 (2d Cir. 1994) ("[N]either knowledge of the breach nor cognizable damages are required to start the statute of limitations running at breach."); Structured Mortg. Trust 1997-2 v. Daiwa Fin. Corp., No. 02 Civ. 3232 (SHS), 2003 WL 548868, at *2 (S.D.N.Y. Feb. 25, 2003) ("The New York Court of Appeals applies an accrual-at-breach rule even when the breach and injury are not

simultaneous.”). Wells Fargo filed its complaint on August 10, 2012, so the suit is timely only if the cause of action accrued on or after August 10, 2006.

A. Timing of the Alleged Breaches

JPMorgan argues that Wells Fargo’s own allegations show that any breach occurred no later than April 29, 2002, the date the MLPA was executed. Indeed, the complaint includes numerous instances that show that the problems Wells Fargo now complains of existed no later than 2002.

First, Wells Fargo alleges that JPMorgan’s representation in the MLPA that the Ground Lease “did not contain any use restrictions that would materially and adversely affect the security provided by the Mortgage” was untrue because of the presence of the First Class Mall Restriction in Section 5.06(a). This provision was added to the Ground Lease when the loan was originated in 2001. Wells Fargo alleges that the restriction was “impossible to satisfy” for several reasons, all of which existed at the restriction’s inception: (1) the leased property did not include the mall’s three anchor stores and therefore the Trust could not ensure they would be operated in a way that preserves the retail nature of the mall to satisfy the restriction; (2) the leased property did not include the anchor stores and thus, by definition, the leased property could not be considered a regional mall; (3) the restriction was not made

conditional on the continued operation of the anchor stores as such; and (4) the restriction gave the lessor the ability to void the Ground Lease, leaving the Trust without collateral for the commercial loan and inhibiting the free assignment of the Trust’s interest in the Ground Lease. The complaint also alleges that early termination of the parking rights would prevent the Trust from making meaningful recovery on its collateral.

Second, the complaint alleges that the MLPA’s representation and warranty regarding compliance with underwriting standards was untrue because JPMorgan “failed to meet its underwriting standards when it originated” the loan. Wells Fargo alleges that underwriting standards required JPMorgan “to determine whether the Ground Lease contained any restriction that was incapable of performance,” and that JPMorgan failed to do so for the reasons just described. Wells Fargo further alleges that JPMorgan did not comply with underwriting standards because it “should have required that the First Class Mall Restriction be tied to the retail operating covenants of the Anchor Stores.” The origination of the loan took place in 2001, and the alleged misrepresentations were made in 2002.

All of these alleged facts existed at the time of origination and at the time the MLPA was executed in 2002.

Wells Fargo's claim, brought in 2012, therefore falls outside New York's six-year statute of limitations.

B. Relevance of the Demand Requirement

Wells Fargo makes two arguments as to why the MLPA's demand provision defeats JPMorgan's statute of limitations defense. Both are without merit.

1. The Limitations Period Commenced When Wells Fargo Could Have Made the Demand.

Wells Fargo first argues that the cause of action accrued not upon JPMorgan's initial breach but rather upon JPMorgan's refusal in 2010 to honor the repurchase demand.

In cases involving contractual demand provisions, the general rule in New York is that "the cause of action accrues when the party making the claim possesses a legal right" to make the demand, not when the demand actually occurs. Hahn Auto. Warehouse, Inc. v. Am. Zurich Ins. Co., 18 N.Y.3d 765, 770 (2012) (alterations omitted). This rule prevents a plaintiff from indefinitely extending the statute of limitations by waiting to make a demand. Id. The New York statutes essentially codify this rule, providing that "where a demand is necessary to entitle a person to commence an action, the time within which the action must be commenced shall be computed from the time when the right to make the demand is complete." N.Y. C.P.L.R. § 206(a).

The exception is for demands that are substantive rather than procedural in nature. Cont'l Cas. Co. v. Stronghold Ins. Co., Ltd., 77 F.3d 16, 21 (2d Cir. 1996). A substantive demand is one that is "an essential element" of the cause of action. Id. at 21; Frigi-Griffin, Inc. v. Leeds, 52 A.D.2d 805, 806 (1st Dep't 1976). A useful example is a claim for replevin of stolen artwork from a good-faith purchaser. The defendant commits no wrong, and thus no cause of action accrues, until he refuses the rightful owner's demand for return of the piece. See Solomon R. Guggenheim Found. v. Lubell, 77 N.Y.2d 311, 317-20 (1991).

This is not such a case. "The cause of action" -- misrepresentations in the MLPA -- "existed and the defendant's conduct giving rise to the claim was complete before the demand was made." Hoelzer v. City of Stamford, Conn., 722 F. Supp. 1106, 1113 n.34 (S.D.N.Y. 1989), aff'd, 933 F.2d 1131 (2d Cir. 1991). The demand at issue here is not a substantive element of the underlying claim for breach but merely a procedural prerequisite to suit. The general rule of N.Y. C.P.L.R. § 206(a) therefore applies, and the statute of limitations began running when Wells Fargo first could have made its demand. See ACE Securities Corp. v. DB Structured Prods., Inc., 977 N.Y.S.2d 229, 231 (1st Dep't 2013) ("The motion court erred in finding that plaintiff's claims did not accrue until defendant either failed to timely cure or repurchase a defective mortgage loan.

To the contrary, the claims accrued on the closing date of the MLPA, . . . when any breach of the representations and warranties contained therein occurred." (citing Daiwa, 2003 WL 548868)).

2. Wells Fargo Had the Right to Demand Repurchase in 2002.

Wells Fargo next argues that, even if § 206(a) applies, the MLPA permitted demand only when a breach of a representation or warranty "materially and adversely affect[ed] the value" of the loan, and that no material and adverse effect ("MAE") was present until default occurred in 2009. In effect, the argument is that Wells Fargo was unable to make a demand until it incurred a financial loss resulting from the breach. Both the complaint and the contract belie that argument.

Wells Fargo's construction of the MAE requirement is at war with its pleadings. The main allegation in the complaint is that the First Class Mall Restriction rendered untrue JPMorgan's representation that the Ground Lease "does not restrict the use of the related Mortgaged Property . . . in a manner that would materially and adversely affect the security provided by the Mortgage." If this representation was indeed false, it follows that the Ground Lease's restrictions, which were present in 2002, did "materially and adversely affect" the value of the property. Wells Fargo also alleges that JPMorgan breached underwriting standards requiring it to "determine whether the

Ground Lease contained any restriction that was incapable of performance." The First Class Mall Restriction, Wells Fargo urges, was "impossible to satisfy" and therefore a "fatal flaw at origination." Surely a fatally flawed loan is one whose value is materially and adversely affected. Finally, the complaint alleges that the loan's value was impaired by the early termination of the parking easement. But if tangible loss is indeed the requirement, then this allegation is premature because the parking lot will continue to exist at least until 2021 and possibly beyond. (The complaint alleges merely that the new tenant "intends" to tear up the lot at that time.)

More importantly, nothing in the contract's language suggests that an actual financial loss must precede a repurchase demand. A growing consensus among New York courts holds that MAE repurchase conditions are triggered when the plaintiff's risk of loss increases and not just when that risk actualizes. See, e.g., Homeward Residential, Inc. v. Sand Canyon Corp., No. 12 Civ. 7319 (AT), 2014 WL 572722, at *14 (S.D.N.Y. Feb. 14, 2014); Assured Guar. Mun. Corp. v. Flagstar Bank, FSB, 892 F. Supp. 2d 596, 602 (S.D.N.Y. 2012); Syncora Guar. Inc. v. EMC Mortg. Corp., 874 F. Supp. 2d 328, 339-40 (S.D.N.Y. 2012); MBIA Ins. Corp. v. Countrywide Home Loans, Inc., 105 963 N.Y.S.2d 21, 22-23 (1st Dep't 2013). In pressing a contrary interpretation, Wells Fargo essentially asks this Court to read the MAE

requirement as an agreement between the parties that a cause of action would not accrue until JPMorgan's breach resulted in a tangible loss. But just as demand provisions cannot indefinitely extend the statute of limitations, they likewise may not be construed to circumvent New York's well established accrual-at-breach rule. Cf. Daiwa, 2003 WL 548868, at *3 ("In effect, plaintiffs are asking this Court to find that, in contract cases where there is a demand requirement, C.P.L.R. § 206(a) imposes the otherwise rejected accrual-at-injury rule. Plaintiffs' argument must be rejected."). Wells Fargo could have demanded repurchase as early as the 2002 closing date of the MLPA, so that is the date that controls for statute-of-limitations purposes.

C. Equitable Estoppel

Wells Fargo styles its final argument as one for "equitable tolling." While the federal courts sometimes distinguish between equitable tolling and the related doctrine of "equitable estoppel," New York courts typically do not. Tenamee v. Schmukler, 438 F. Supp. 2d 438, 443 n.3 (S.D.N.Y. 2006). Semantics notwithstanding, to escape the statute of limitations on this ground a plaintiff must show that it has been "prevented in some extraordinary way from exercising [its] rights." Johnson v. Nyack Hosp., 86 F.3d 8, 12 (2d Cir. 1996).

Wells Fargo has made no such showing here. To the extent the argument relies upon omissions on JPMorgan’s part, it fails because, as Wells Fargo admits, the doctrine requires that “the opposing party acted to render the plaintiff unaware that the cause of action existed.” Def’s Opp’n Mem. at 13 (emphasis added) (citation and internal quotation marks omitted). And to the extent it relies upon JPMorgan’s affirmative misrepresentations, it fails because those alleged inaccuracies are precisely what gave rise to this lawsuit in the first place. “[E]quitable estoppel does not apply where the misrepresentation or act of concealment underlying the estoppel claim is the same act which forms the basis of plaintiff's underlying substantive cause of action.” Kaufman v. Cohen, 760 N.Y.S.2d 157, 167 (1st Dep’t 2003) (citing Rizk v. Cohen, 73 N.Y.2d 98, 105–106 (1989)). Were that not so, this “extraordinary” remedy would become quite ordinary indeed in contractual misrepresentation cases, which virtually by definition involve plaintiffs who have been misled.

CONCLUSION

For the foregoing reasons, JPMorgan's motion is granted and the complaint is dismissed. The Clerk is directed to close this case.

SO ORDERED.

Dated: New York, New York
March 27, 2014

S/________________________________
MIRIAM GOLDMAN CEDARBAUM
United States District Judge